

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Implementation of the)
Telecommunications Act of 1996:)

Telemessaging,)
Electronic Publishing, and)
Alarm Monitoring Services)

CC Docket No. 96-152

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**FIRST REPORT AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION

1. In February 1996, the "Telecommunications Act of 1996" became law.¹ The intent of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."²

2. On July 18, 1996, the Commission released a Notice of Proposed Rulemaking ("Notice") regarding implementation of sections 260, 274, and 275 of the Communications Act addressing telemessaging, electronic publishing, and alarm monitoring services, respectively.³ This Order implements the non-accounting requirements of sections 260 and 274. We address in separate proceedings the alarm monitoring provisions of section 275 and the enforcement issues related to sections 260, 274, and 275.⁴ In addition, the accounting safeguards required to implement sections 271 through 276 and section 260 are addressed in a separate proceeding.⁵

3. The 1996 Act opens local markets to competing providers by imposing new interconnection, unbundling, and resale obligations on existing providers of local exchange services.⁶ In enacting sections 260 and 274, Congress recognized that the local exchange market will not be fully competitive immediately. Congress therefore imposed requirements applicable to local exchange carriers' (LECs') provision of telemessaging services in section 260, and a series of requirements applicable to Bell Operating Companies' (BOCs') provision

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), to be codified at 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

² See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement); see also 1996 Act, § 706(a), 110 Stat. 56 (encouraging the deployment of advanced telecommunications capability to all Americans).

³ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Notice of Proposed Rulemaking, FCC 96-310 (rel. July 18, 1996).

⁴ See *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Notice of Proposed Rulemaking, FCC 96-460 (rel. Nov. 27, 1996) at ¶ 62 ("Enforcement NPRM").

⁵ See *Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, FCC 96-490, (rel. Dec. 24, 1996) ("Accounting Safeguards Order").

⁶ See 47 U.S.C. § 251.

of electronic publishing services in section 274. Collectively, these requirements are designed to prevent, or facilitate the detection of, improper cost allocation, discrimination, or other anticompetitive conduct.

4. Section 260 permits incumbent LECs (including BOCs) to provide telemessaging service subject to certain nondiscrimination safeguards. Section 274 allows a BOC to provide electronic publishing service disseminated by means of its basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture" that meets the separation, joint marketing, and nondiscrimination requirements in that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted must comply with section 274 by February 8, 1997.⁷ As noted in part VIII, *infra*, the requirements of this *Order* will become effective 30 days after publication of a summary in the Federal Register. In addition, the collection of information contained in this *Order* is contingent upon approval by the Office of Management and Budget (OMB). Accordingly, we do not anticipate taking any enforcement action based on these requirements until they become effective. The requirements under section 274 expire on February 8, 2000.⁸

5. In this proceeding, our goal is to implement the non-accounting requirements in sections 260 and 274 in a manner that is consistent with the fundamental goal of the 1996 Act -- to open all telecommunications markets to robust competition. By fostering competition in these markets, we seek to produce maximum benefits for consumers of telemessaging and electronic publishing services.

II. SCOPE OF THE COMMISSION'S AUTHORITY

A. Electronic Publishing

1. Background

6. In the *Notice*, we sought comment on the extent to which section 274 grants the Commission authority over the intrastate provision of electronic publishing services.⁹ We noted that section 274(b)(4) specifically refers to "such regulations as may be prescribed by the Commission or a State commission" for the valuation of BOC assets.¹⁰ We therefore

⁷ *Id.* § 274(g)(1).

⁸ *Id.* § 274(g)(2).

⁹ *Notice* at ¶ 23.

¹⁰ *Id.*

tentatively concluded that the Commission may not have exclusive jurisdiction over all aspects of intrastate services provided pursuant to section 274.¹¹

7. In addition, apart from any intrastate jurisdiction conferred by section 274 itself, we sought comment on the extent to which the Commission may have the authority to preempt inconsistent state regulations with respect to matters addressed by section 274.¹²

2. Comments¹³

8. AT&T contends that section 274 covers both interstate and intrastate provision of electronic publishing services,¹⁴ and that this section confers on the Commission general jurisdiction over the provision of intrastate electronic publishing services.¹⁵ In support of its position, AT&T points to several sections that, in its view, refer to Commission authority over intrastate electronic publishing, including: (1) section 274(e), which authorizes the Commission to hear complaints for violations of section 274; (2) section 274(f), which requires all separated BOC affiliates engaged in electronic publishing to file reports with the Commission; and (3) section 274(c)(2)(C), which grants the Commission the authority to determine whether the BOCs may be authorized to have a greater financial control of a joint venture with small, local electronic publishers.¹⁶ AT&T further maintains that the reference to valuation of BOC assets by state commissions in section 274(b)(4) does not restrict the Commission's general regulatory authority to establish rules, but merely indicates that, if a state commission has its own accounting rules, those rules should be applied to the extent they are not inconsistent with the Commission's rules.¹⁷

9. NAA contends that, because section 274 is silent with respect to whether it covers interstate or intrastate, and interLATA or intraLATA electronic publishing, and because electronic publishing services are not regulated telecommunications services, the Commission's authority under section 274 is limited to enforcing BOC compliance with the section's requirements that BOCs operate through a separated affiliate or electronic publishing

¹¹ *Id.*

¹² Notice at ¶ 25 (citing *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (*Louisiana PSC*)).

¹³ Parties that filed comments and replies are listed in the Appendix.

¹⁴ AT&T at 9-10. We note also that NYNEX and YPPA contend that section 274 covers the provision of all electronic publishing services, both interLATA and intraLATA. See NYNEX at 4-5; YPPA at 2.

¹⁵ AT&T at 10-11.

¹⁶ *Id.*

¹⁷ AT&T at 11-12.

joint venture and make various filings and reports.¹⁸ NAA further asserts that the Commission has authority to adjudicate complaints and requests for cease and desist orders with respect to violations of section 274, whether interstate or intrastate, but that states are not precluded from also enforcing this law.¹⁹ NAA also contends that states should be allowed to continue to use their cost allocation procedures for intrastate purposes.²⁰

10. A number of BOCs and state commissions, on the other hand, argue that section 274 does not give the Commission authority over intrastate electronic publishing services.²¹ Some of these commenters argue that section 274 covers such intrastate services, but that this section does not divest the states of their authority over intrastate services under section 2(b) of the Communications Act.²² These latter commenters argue that section 274 contains new requirements that state commissions will implement in their traditional role of regulating intrastate electronic publishing services.²³

11. These BOCs and state commissions also argue that section 2(b) of the Communications Act and section 601(c) of the 1996 Act bar the Commission from exercising authority under section 274 with respect to intrastate electronic publishing services absent an express grant of authority from Congress.²⁴ PacTel and Ameritech contend that such a grant of authority is provided in section 274 in limited circumstances, including receiving BOC filings, prescribing regulations to value BOC asset transfers, and acting on complaints and applications for cease-and-desist orders.²⁵ The California Commission argues that, although section 274(e) clearly supports our jurisdiction over complaints alleging violations of section 274, that section does not preclude states from trying to resolve disputes prior to the filing of a complaint or lawsuit in the federal arena.²⁶ BellSouth disputes even this limited grant of authority over intrastate electronic publishing services, arguing that section 274(e) does not

¹⁸ NAA at 2-3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ameritech at 4; Bell Atlantic at 2-4; BellSouth at 7-8; California Commission at 6-8; New York Commission at 2; PacTel at 4-5.

²² Ameritech at 6-7; Bell Atlantic at 4.

²³ *Id.*

²⁴ Ameritech at 6; Bell Atlantic at 3; BellSouth at 7-8; BellSouth Reply at 3-4; California Commission at 7.

²⁵ Ameritech at 5-6; PacTel at 4-5.

²⁶ California Commission at 8.

give the Commission either explicit or implicit statutory jurisdiction over intrastate electronic publishing services.²⁷

12. Several BOCs and state commissions claim that the Commission may preempt state regulations and exercise jurisdiction over intrastate electronic publishing only to the extent that such services are inseparably mixed interstate-intrastate communications, pursuant to the standard set forth in *Louisiana PSC*.²⁸ The New York and California Commissions further argue that the Commission currently has no basis to make the showing necessary to preempt state regulation of intrastate electronic publishing.²⁹

13. AT&T and MCI contend that the Commission retains the authority to preempt state regulatory requirements relating to electronic publishing that are inconsistent with its policies and rules.³⁰ AT&T further argues that, because the interstate and intrastate aspects of electronic publishing cannot be separated, the Commission's jurisdiction over interstate electronic publishing services extends to such intrastate services as well.³¹

3. Discussion

14. As discussed above, in the *Notice*, we tentatively concluded that the Commission may not have exclusive jurisdiction over all aspects of intrastate services provided pursuant to section 274, based on the language of section 274(b)(4).³² This section provides that BOCs and their separated affiliates or electronic publishing joint ventures must "value any assets that are transferred . . . and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies."³³ After examining the language of the statute and the comments filed in this proceeding, we conclude, for the reasons set forth below, that the Commission's authority under section 274 applies to the provision of intrastate as well as interstate electronic publishing services. We conclude, therefore, that while states may impose regulations with respect to BOC provision of electronic publishing services, those regulations must not be inconsistent with section 274 and the Commission's rules

²⁷ BellSouth at 8.

²⁸ Bell Atlantic at 3-4; BellSouth at 8; BellSouth Reply at 3-4; California Commission at 8-9; New York Commission at 4-5; see also *Louisiana PSC*, 476 U.S. at 375 n.4.

²⁹ BellSouth Reply at 3-4; California Commission at 8-9; New York Commission at 7-8.

³⁰ AT&T Reply at 9-10; MCI at 3.

³¹ AT&T Reply at 9-10.

³² *Notice* at ¶ 23.

³³ 47 U.S.C. § 274(b)(4).

thereunder. We emphasize, however, that the scope of the Commission's authority under section 274 extends only to matters covered by that section.

15. Thus, we agree with AT&T and Bell Atlantic that section 274 applies not only to the provision of interstate electronic publishing services, but also to such services when they are provided on an intrastate basis.³⁴ The language in section 274 expressly demonstrates that Congress intended this section to reach intrastate electronic publishing services. For example, section 274(c)(2)(C) expressly limits the permissible participation of a BOC or affiliate in electronic publishing joint ventures to an interest of 50 percent or less, but also provides that, "[i]n the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest."³⁵ Notwithstanding the local nature of small, local electronic publishers,³⁶ which suggests that they provide intrastate services, this section confers authority on the Commission to determine whether BOCs may have a greater interest in electronic publishing joint ventures with such electronic publishers.

16. In addition, section 274 requires that a BOC or BOC affiliate engage in the provision of electronic publishing services disseminated by means of that BOC or its affiliate's "basic telephone service" only through a "separated affiliate" or an electronic publishing joint venture."³⁷ The statute defines "basic telephone service" to mean "any wireline telephone exchange service, or wireline telephone exchange service facility . . ."³⁸ The term "telephone exchange service," as defined in section 3(47), is a primarily intrastate service.³⁹ As we noted in the *Accounting Safeguards Order*, these references to primarily intrastate services clearly indicate that the scope of section 274 encompasses intrastate matters.⁴⁰

³⁴ AT&T at 9-10; Bell Atlantic at 4.

³⁵ 47 U.S.C. § 274(c)(2)(C).

³⁶ We note, for example, that the legislative history of this provision indicates that "small, local electronic publishers" was intended to apply to publishers serving communities of fewer than 50,000 persons. See discussion *infra* ¶¶ 171, 175.

³⁷ See 47 U.S.C. § 274(a).

³⁸ *Id.* § 274(i)(2).

³⁹ *Id.* § 153(47).

⁴⁰ See *Accounting Safeguards Order* at ¶ 39 (finding that "telephone exchange service" and "basic telephone service" are primarily intrastate services, and that therefore section 274, among other sections, expressly reaches intrastate services).

17. We further conclude that, given the jurisdiction granted by section 274, the Commission also has jurisdiction under the Communications Act to establish rules applicable to intrastate electronic publishing services. Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate in order to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.⁴¹ Nothing in section 274 bars the Commission from clarifying and implementing the requirements of section 274. Moreover, courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.⁴² In addition, it is well-established that an agency has the authority to adopt rules to administer congressionally mandated requirements.⁴³

18. Our conclusion that the Commission has jurisdiction under the Communications Act to establish rules applicable to the full scope of section 274, including intrastate electronic publishing services, is particularly appropriate where, as here, the Commission is authorized to adjudicate complaints alleging violations of section 274.⁴⁴ Section 274(e) provides a private right of action to any person claiming that an act or practice of a BOC, affiliate, or separated affiliate has violated any requirement of section 274.⁴⁵ Under section 274(e)(1), such person may file a complaint with the Commission or bring suit in a U.S. District Court as provided in section 207.⁴⁶ In addition to damages, section 274(e)(2) permits an aggrieved person to apply to the Commission for a cease-and-desist order or to a U.S. District Court for an injunction or an order compelling compliance.⁴⁷ We find that it serves

⁴¹ See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956).

⁴² *National Broadcasting Co. v. United States*, 319 U.S. at 190, 219 (1943); see also *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978).

⁴³ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (holding that "[t]he power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

⁴⁴ See *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514 (D.C. Cir.) (en banc), cert. denied, 454 U.S. 822 (1981); *National Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974) (both cases concluding that an agency that has authority to enforce a section of a statute also has generalized rulemaking authority to interpret that section in a rulemaking).

⁴⁵ See 47 U.S.C. § 274(e).

⁴⁶ 47 U.S.C. § 274(e)(1). Section 207 states that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." 47 U.S.C. § 207.

⁴⁷ 47 U.S.C. § 274(e)(2).

the public interest for us to clarify in advance the section 274 requirements imposed on the BOCs that parties may ask us to enforce later. Such clarification of the requirements will reduce uncertainty, aid BOCs and their affiliates in complying with the requirements of section 274, and facilitate the prompt resolution of compliance disputes that may be presented in complaint proceedings.⁴⁸

19. We reject the argument that section 2(b) of the Communications Act requires the conclusion that section 274, and the Commission's authority thereunder, apply only to the provision of interstate electronic publishing services. As demonstrated, for example, by section 274(c)(2)(C)'s grant of authority to the Commission to alter the maximum interest that a BOC may hold in electronic publishing joint ventures with small, local electronic publishers, Congress gave the Commission intrastate jurisdiction without amending section 2(b).⁴⁹ Thus, we find that, in enacting section 274 after section 2(b), and squarely addressing therein the issues before us by using the statutory language discussed above, Congress intended for section 274 to take precedence over any contrary implications based on section 2(b).⁵⁰

20. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters arising under section 274. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."⁵¹ As discussed above, we conclude that section 274 expressly modifies federal law, and the Commission's statutory authority thereunder, to reach intrastate electronic publishing services.

⁴⁸ See *Enforcement NPRM* (seeking comment on proposals to improve the speed and effectiveness of the formal complaint process).

⁴⁹ See also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. Dec. 24, 1996) at ¶ 41 (discussing a number of other statutory examples where Congress, in enacting the 1996 Act, gave the Commission intrastate jurisdiction without amending section 2(b)) (*Non-Accounting Safeguards Order*).

⁵⁰ See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); see also 2 J. Sutherland, *Statutory Construction* § 22.34 (6th ed.) (where amended and original sections of a statute cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will); *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196, 200 (2d Cir. 1974).

⁵¹ 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

B. Telemessaging

1. Background

21. In the *Notice*, we sought comment on the extent to which section 260 grants the Commission statutory authority over the intrastate provision of telemessaging services.⁵² We stated that telemessaging is an information service that, when provided by a BOC or its affiliate on an interLATA basis, is subject to the requirements of section 272 in addition to the requirements of section 260.⁵³ We also noted that, in the *Non-Accounting Safeguards NPRM*,⁵⁴ we tentatively concluded that the Commission's authority under sections 271 and 272 applies to interstate and intrastate interLATA information services provided by BOCs or their affiliates.⁵⁵ Further, we pointed out that section 260 applies not only to BOCs and their affiliates, but also to all incumbent LECs.⁵⁶ Finally, apart from any intrastate jurisdiction conferred by section 260 itself, we sought comment in the *Notice* on the extent to which the Commission may have the authority to preempt inconsistent state regulations with respect to matters addressed by section 260.⁵⁷

2. Comments

22. AT&T, ATSI, and Voice-Tel contend that section 260, and the Commission's authority thereunder, apply to all telemessaging services provided by incumbent LECs, including interstate and intrastate, as well as interLATA and intraLATA, telemessaging services.⁵⁸ ATSI contends that any attempt to limit the applicability of section 260 would deny providers of telemessaging a remedy against anticompetitive practices that Congress intended to provide them.⁵⁹ AT&T further contends that section 260 is an independent grant of authority to the Commission and is not restricted in any way by sections 271 and 272.

⁵² *Notice* at ¶¶ 19-20.

⁵³ *Id.* at ¶ 19.

⁵⁴ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-149 (rel. July 18, 1996) (*Non-Accounting Safeguards NPRM*).

⁵⁵ *Notice* at ¶ 19.

⁵⁶ *Id.* at ¶ 20.

⁵⁷ *Id.* at ¶ 21 (citing *Louisiana PSC*, 476 U.S. at 375 n.4).

⁵⁸ ATSI at 4; ATSI Reply at 2; AT&T at 5; Voice-Tel at 7-8.

⁵⁹ ATSI at 4.

Rather, AT&T contends that sections 271 and 272 complement section 260 by imposing additional requirements on the BOCs.⁶⁰

23. Some BOCs and state commissions, on the other hand, argue that section 2(b) of the Communications Act and section 601(c) of the 1996 Act bar the Commission from exercising authority under section 260 with respect to any intrastate telemessaging services absent an express grant of authority from Congress.⁶¹ Some of these commenters contend that nothing in section 260 gives the Commission authority over any intrastate telemessaging services.⁶² Ameritech argues that section 260 grants the Commission limited jurisdiction over both interLATA and intraLATA telemessaging services, but only to the extent necessary to adjudicate complaints by other telemessaging providers that an incumbent LEC has improperly subsidized its telemessaging services or discriminated against other telemessaging services in violation of section 260.⁶³ BellSouth argues that, although sections 271 and 272 give the Commission limited reach over intrastate interLATA telemessaging services, such jurisdiction is not comprehensive and does not reach intrastate intraLATA telemessaging services.⁶⁴

24. Several BOCs and state commissions claim that the Commission may preempt state regulations and exercise jurisdiction over intrastate telemessaging services only subject to the *Louisiana PSC*⁶⁵ exception for inseparably mixed interstate-intrastate communications.⁶⁶ The New York Commission and BellSouth further argue that the Commission currently has no basis to make the showing necessary to preempt state regulation of intrastate telemessaging services.⁶⁷

25. AT&T, MCI, and Voice-Tel contend that the Commission has authority to preempt state regulatory requirements relating to telemessaging services that are inconsistent

⁶⁰ AT&T at 6.

⁶¹ Ameritech at 5-6; Bell Atlantic at 3; BellSouth at 4-5; California Commission at 3-4; New York Commission at 2.

⁶² Bell Atlantic at 3; California Commission at 4; New York Commission at 2.

⁶³ Ameritech at 5.

⁶⁴ BellSouth at 5-6.

⁶⁵ *Louisiana PSC*, 476 U.S. at 375 n.4.

⁶⁶ Bell Atlantic at 3; BellSouth at 6; BellSouth Reply at 3-4; California Commission at 4-5; New York Commission at 2.

⁶⁷ BellSouth at 6-7; BellSouth Reply at 3-4; New York Commission at 2.

with its policies and rules.⁶⁸ Voice-Tel and AT&T further argue that, because the interstate and intrastate aspects of telemessaging services cannot be separated, the Commission's jurisdiction over interstate telemessaging services extends to such intrastate services as well.⁶⁹

26. Cincinnati Bell argues that the Commission should preempt state regulations that restrict the ability of small and mid-sized incumbent LECs to provide telemessaging services on an integrated basis.⁷⁰

3. Discussion

27. For the reasons set forth below, we conclude that section 260, and the Commission's authority thereunder, apply to the provision of intrastate as well as interstate telemessaging services. Consequently, we find that section 2(b) of the Communications Act does not bar the Commission from establishing regulations to clarify and implement the requirements of section 260 that apply to intrastate services. We conclude, therefore, that the rules we may establish to implement section 260 are binding on the states, and that the states may not impose regulations with respect to incumbent LEC provision of telemessaging services that are inconsistent with section 260 and the Commission's rules thereunder.

28. In the *Non-Accounting Safeguards Order*, we concluded that telemessaging is an information service that, when provided by a BOC or its affiliate on an interLATA basis, is subject to the requirements of section 272.⁷¹ We further concluded that section 272 applies to both intrastate and interstate interLATA information services.⁷² We have therefore already concluded that the Commission has jurisdiction over certain aspects of intrastate telemessaging services.

29. Section 260 not only imposes additional obligations on BOCs to prevent unlawful subsidization, and discrimination in favor, of its telemessaging service, but also extends its requirements beyond BOCs and their affiliates to all incumbent LECs. We conclude that section 260 applies to the provision of all telemessaging services by incumbent LECs, whether interstate or intrastate, and for BOCs, whether interLATA or intraLATA. This conclusion is supported by the terms of the statute. Specifically, section 260 prohibits an incumbent LEC from, among other things, subsidizing its telemessaging service from its

⁶⁸ ATSI at 5; AT&T at 6 n.3; AT&T Reply at 4; MCI at 3; Voice-Tel at 7-8.

⁶⁹ ATSI at 5; AT&T Reply at 4; Voice-Tel at 7-8.

⁷⁰ Cincinnati Bell at 7-8.

⁷¹ *Non-Accounting Safeguards Order* at ¶ 145.

⁷² *Id.* at ¶ 30.

"telephone exchange service or its exchange access."⁷³ "Telephone exchange service," as defined in section 3(47), is a primarily intrastate service.⁷⁴ As we noted in the *Accounting Safeguards Order*, this reference to a primarily intrastate service clearly indicates that the scope of section 260 encompasses intrastate matters.⁷⁵

30. We reject BellSouth's argument that section 260 does not apply to intrastate intraLATA services. As discussed below,⁷⁶ section 260, unlike section 272, does not make a distinction between interLATA and intraLATA services. Moreover, the terms in section 260 encompass both interLATA and intraLATA services.

31. We further conclude that, given the jurisdiction granted by section 260, the Commission also has jurisdiction under the Communications Act to establish rules applicable to intrastate telemessaging services. As noted above, sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.⁷⁷ Nothing in section 260 bars the Commission from clarifying and implementing the requirements of this section.

32. Our conclusion that the Commission has jurisdiction to establish rules applicable to intrastate telemessaging services is particularly appropriate where, as here, the Commission exercises an adjudicatory function.⁷⁸ Section 260(b) requires that the Commission establish expedited procedures for the receipt and review of complaints alleging violations of the nondiscrimination provisions in section 260(a), or regulations adopted pursuant thereto, that result in "material financial harm" to a provider of telemessaging service.⁷⁹ As in our discussion of section 274 above,⁸⁰ we find that it serves the public interest for us to clarify in advance the section 260 requirements that are imposed on incumbent LECs and that parties may ask us to enforce later. Such clarifications will reduce uncertainty, aid incumbent LECs in complying with the requirements of section 260, and

⁷³ 47 U.S.C. § 260(a)(1).

⁷⁴ *Id.* § 153(47).

⁷⁵ See *Accounting Safeguards Order* at ¶ 39 (finding that "telephone exchange service" is primarily an intrastate service, and that therefore section 260, among other sections, expressly reaches intrastate services).

⁷⁶ See *infra* ¶ 210.

⁷⁷ See *supra* ¶ 17.

⁷⁸ See *supra* note 44.

⁷⁹ 47 U.S.C. § 260(b).

⁸⁰ See *supra* ¶ 18.

facilitate the prompt resolution of compliance disputes that may be presented in complaint proceedings.⁸¹

33. We reject the argument that section 2(b) of the Communications Act requires the conclusion that section 260, and the Commission's authority thereunder, apply only to the provision of interstate telemessaging services. Rather, as discussed above with respect to electronic publishing under section 274, we find that, in enacting section 260 after section 2(b), and squarely addressing therein the issues before us, Congress intended for section 260 to take precedence over any contrary implications based on section 2(b).⁸²

34. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters arising under section 260. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."⁸³ As discussed above, we conclude that section 260 expressly modifies federal law, so that both federal law, and the Commission's authority thereunder, apply to both interstate and intrastate provision of telemessaging services.

C. Constitutional Issues

35. BellSouth and U S WEST raise constitutional concerns with respect to our implementation of sections 260 and 274.⁸⁴ BellSouth contends that the Commission must be "circumspect" in its construction of sections 260 and 274 because both the separate affiliate requirement of section 272 that we proposed applying to BOCs' interLATA telemessaging services and the separated affiliate requirement of section 274 "impose impermissible prior restraints on BOCs' speech activities," in violation of the First Amendment.⁸⁵ Further, it maintains that sections 260 and 274, as well as other sections of the Act, are unconstitutional "bills of attainder" to the extent they single out BOCs by name and impose restrictions on

⁸¹ See *Enforcement NPRM* (seeking comment on proposals to improve the speed and effectiveness of the formal complaint process).

⁸² See *supra* ¶ 19.

⁸³ 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

⁸⁴ BellSouth at 2-3; U S WEST Reply at 2-3. These concerns were not raised in response to any inquiry in the *Notice*.

⁸⁵ BellSouth at 2-3.

them alone.⁸⁶ Recognizing that we have no discretion to ignore Congress' mandate to apply sections 260 and 274, BellSouth urges us to construe these sections, and others, narrowly.⁸⁷ U S WEST concurs with BellSouth and urges the Commission not to adopt any structural rules beyond the express terms of the statute.⁸⁸

36. NAA, in reply, dismisses BellSouth's constitutional arguments.⁸⁹ It rejects as frivolous the argument that the electronic publishing safeguards are an unconstitutional prior restraint on BOCs' speech activities. It further states that the separated affiliate requirement (1) is a "reasonable approach to detecting and preventing cross-subsidy and discrimination that does not unnecessarily burden the BOCs' right to speak;" (2) does not violate the First Amendment because it expires four years after enactment of the Act and serves important government interests; and (3) is not a bill of attainder because BOCs are only singled out for "temporary, narrowly-focused, economic regulation."⁹⁰

37. Although decisions about the constitutionality of congressional enactments are generally outside the jurisdiction of administrative agencies,⁹¹ we have an obligation under Supreme Court precedent to construe a statute "where fairly possible to avoid substantial constitutional questions" and not to "impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by the [Supreme Court]."⁹² As BellSouth

⁸⁶ BellSouth states that singling out BOCs for specific treatment under the Act violates Articles I and III of the Constitution and specifically, the Bill of Attainder Clause, Art. I, § 9, cl.3. *Id.* Article I, § 9, applicable to Congress, provides, in relevant part, that "[n]o Bill of Attainder or ex post facto Law shall be passed." A Bill of Attainder is a legislative act that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." Black's Law Dictionary 150 (5th ed. 1979).

⁸⁷ For example, BellSouth states that since section 260 does not impose a separate affiliate requirement on BOCs' telemessaging operations, we should "avoid engrafting on such activities the constitutionally-infirm separate affiliate requirements of Section 272 for interLATA information services." BellSouth at 3.

⁸⁸ U S WEST Reply at 2-3 (contending that "FCC rules adding to these statutory restrictions -- especially if adopted as a matter of statutory interpretation, not public interest analysis -- would create a second violation of the Constitution").

⁸⁹ NAA's comments only address BellSouth's comments respecting the constitutionality of section 274. NAA Reply at 2-3.

⁹⁰ *Id.*

⁹¹ See *Johnson v. Robison*, 415 U.S. 361, 368 (1974).

⁹² *United States v. X-Citement Video*, 115 S. Ct. 464, 467, 469 (1994); see also *Non-Accounting Safeguards Order* at ¶ 279.

concedes, we have no discretion to ignore Congress' mandate respecting these sections or any other sections of the Act.⁹³ Nevertheless, we find BellSouth's argument to be without merit.

38. With respect to section 274, we reject the argument that requiring BOCs to provide electronic publishing services through a separated affiliate violates the First Amendment. BellSouth bases its argument on an assertion that, as "content-related" services, electronic publishing services are commercial speech entitled to First Amendment protection.⁹⁴ We conclude that, to the extent that BOC provision of electronic publishing services constitutes speech for First Amendment purposes, the section 274 separated affiliate requirement neither prohibits the BOCs from providing such services, nor places any restrictions on the content of the information the BOCs may provide. Instead, the section 274 separated affiliate requirement is a content-neutral restriction on the manner in which BOCs may provide electronic publishing services that are disseminated by means of a BOC's basic telephone service.⁹⁵ These restrictions address the important governmental interest of protecting against improper cost allocation and discrimination by the BOCs, and they do so in a narrowly-tailored, content-neutral manner. Thus, we conclude that the separated affiliate requirement imposed by section 274 on BOC provision of electronic publishing services does not violate the First Amendment.

39. Similarly, we reject BellSouth and U S WEST's argument that section 274 is an unconstitutional "bill of attainder" because the statute singles out BOCs by name and imposes restrictions on them alone. We conclude that section 274 is not an unconstitutional bill of attainder simply because it applies only to the BOCs.⁹⁶ Rather, judicial precedent teaches that, in determining whether a statute amounts to an unlawful bill of attainder, we must consider whether the statute "further[s] nonpunitive legislative purposes," and whether Congress evinced an intent to punish.⁹⁷ As noted above, the section 274 restrictions on BOC provision of electronic publishing services are temporary requirements aimed at protecting against improper cost allocation and discrimination by the BOCs. Moreover, we find no evidence, and BellSouth and US WEST have offered none, that would support a finding that Congress enacted section 274 to punish the BOCs. In fact, in enacting the 1996 Act,

⁹³ BellSouth at 2-3.

⁹⁴ *Id.* at 3.

⁹⁵ Content-neutral time, place, and manner restrictions that serve a substantial government interest are constitutionally permissible. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986).

⁹⁶ *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 471-72 (concluding that the fact that a statute applies only to a limited group does not automatically offend the Bill of Attainder Clause).

⁹⁷ *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984).

Congress freed BOCs from the terms of an antitrust consent decree.⁹⁸ Thus, we conclude that the section 274 restrictions imposed on BOCs do not violate the Bill of Attainder Clause.

40. With respect to section 260, BellSouth raises constitutional issues in this proceeding regarding the tentative conclusion in the *Non-Accounting Safeguards NPRM* that, under section 272, BOCs must provide interLATA telemessaging services through a separate affiliate.⁹⁹ We find no merit in BellSouth's arguments for the same reasons discussed above and in the *Non-Accounting Safeguards Order*.¹⁰⁰

III. BOC PROVISION OF ELECTRONIC PUBLISHING - SECTION 274

A. Definition of Electronic Publishing

1. Electronic Publishing Services under Section 274(h)

a. Background

41. Section 274(h)(1) defines "electronic publishing" as:

the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.¹⁰¹

Section 274(h)(2) also lists specific services that are excluded from the definition of electronic publishing. These excepted services include, among other things, common carrier provision of telecommunications service, information access service, information gateway service, voice storage and retrieval, electronic mail, certain data and transaction processing services,

⁹⁸ See 1996 Act, § 601(a), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

⁹⁹ *Non-Accounting Safeguards NPRM* at ¶ 54. Because the *Non-Accounting Safeguards Order* concluded that BOC provision of interLATA telemessaging services is an information service subject to the requirements of section 272, that order required BOCs that provide such services on an interLATA basis to do so through a separate affiliate. See *Non-Accounting Safeguards Order* at ¶ 145.

¹⁰⁰ See *Non-Accounting Safeguards Order* at ¶ 87 (finding that, to the extent that the separate affiliate requirement in section 272 restricts protected speech, it is a content-neutral restriction that does not violate the First Amendment).

¹⁰¹ 47 U.S.C. § 274(h)(1).

electronic billing or advertising of a BOC's regulated telecommunications services, language translation or data format conversion, "white pages" directory assistance, caller identification services, repair and provisioning databases, credit card and billing validation for telephone company operations, E 911 and other emergency assistance databases, and video programming and full motion video entertainment on demand.¹⁰²

42. In the *Notice*, we sought comment on how to distinguish the services that are properly included in the definition of electronic publishing in section 274(h)(1) from those services that are excluded under 274(h)(2). We asked parties to identify any enhanced services that BOCs currently provide that appear to meet the definition of an electronic publishing service under section 274. To the extent it is unclear whether a particular service, or a particular group of services, is encompassed by the statutory definition of electronic publishing, we invited parties to identify the basis for the ambiguity and to make recommendations on how the service, or services, should be classified.¹⁰³ For example, we cited the *Non-Accounting Safeguards NPRM*, which sought comment on whether we should classify as "electronic publishing" services those services for which the carrier "controls, or has a financial interest in, the content of the information transmitted by the service."¹⁰⁴

43. In addition, we observed in the *Notice* that, although electronic publishing is specifically included in the definition of information services,¹⁰⁵ BOC provision of electronic publishing is explicitly exempted from the separate affiliate and nondiscrimination requirements of section 272 that apply to BOC provision of interLATA information services.¹⁰⁶ We noted that, in contrast to section 272, which applies only to BOC provision of interLATA information services, section 274 does not distinguish between the intraLATA and interLATA provision of electronic publishing services. We sought comment, therefore, on whether section 274 applies to BOC provision of both intraLATA and interLATA electronic publishing services.¹⁰⁷

¹⁰² See 47 U.S.C. § 274(h)(2).

¹⁰³ *Notice* at ¶ 31.

¹⁰⁴ *Id.* at ¶ 29 n.41.

¹⁰⁵ 47 U.S.C. § 153(20).

¹⁰⁶ *Id.* § 272(a)(2)(C).

¹⁰⁷ *Notice* at ¶ 29.

b. Comments

44. NAA asserts that the definition of electronic publishing in section 274(h) is clear and detailed; therefore, it contends, there is no need to anticipate ambiguous services at this time.¹⁰⁸ Other commenters agree that the definition of electronic publishing in section 274(h)(1) is clear, but suggest that Commission clarification of some of the exceptions to electronic publishing in section 274(h)(2) would be appropriate.¹⁰⁹ For example, several parties ask us to clarify that the "gateway" exception in section 274(h)(2)(C) includes access to a home page that electronically links selected Internet sites or other home pages. Similarly, they contend that introductory information regarding an Internet service provider's services and electronic linkage to these services should also be included in the "gateway" exception.¹¹⁰ In addition, they contend that software browsers should be considered "navigational systems," which are also excluded from the definition of electronic publishing under section 274(h)(2)(C).¹¹¹ AT&T notes, however, that, even where particular BOC services are exempt from the requirements of section 274, the separate affiliate requirements of section 272 may still apply.¹¹²

45. Some commenters also ask us to clarify that BOC transmission of information that falls within the definition of electronic publishing under section 274(h)(1) does not make the BOC's transmission of such information subject to the requirements of section 274 unless the BOC has control of, or a financial interest in, the content of the information transmitted.¹¹³ Those situations where a BOC merely provides access to another entity's content, they argue, should not be considered electronic publishing.

c. Discussion

46. We find, as the commenters indicate, that electronic publishing services may include services provided through the Internet or through proprietary data networks. We also find that, although the definition of electronic publishing in section 274(h) is quite detailed, clarification of the "gateway" exception of section 274(h)(2)(C) is appropriate. Section 274(h)(2)(C) provides that electronic publishing shall not include:

¹⁰⁸ NAA at 3.

¹⁰⁹ See, e.g., Bell Atlantic at 4-5; Joint Parties at 3; NYNEX Reply at 12; USTA at 3.

¹¹⁰ Joint Parties at 3-5; NYNEX Reply at 12-13; PacTel Reply at 5 n.7; SBC Reply at 6; USTA at 3; see also Ameritech at 9 (arguing that we should interpret the "gateway exception" in section 274(h)(2)(C) broadly); Bell Atlantic at 5.

¹¹¹ Joint Parties at 3-5; NYNEX Reply at 12-13; SBC Reply at 6; USTA at 3.

¹¹² AT&T at 12; AT&T Reply at 10, n. 22.

¹¹³ See NYNEX at 7-8; NYNEX Reply at 11-12; PacTel Reply at 4-5; SBC Reply at 5-6; YPPA at 2-3.

The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

We conclude, consistent with the comments on this issue, that a BOC's provision of access to introductory World Wide Web home pages, other types of introductory information, and software (such as browsers) does not constitute the provision of electronic publishing services under section 274(h)(2)(C). We find that, as long as a BOC merely provides access to a home page, or an initial screen that does not include any of the enumerated content types in section 274(h)(1), it is engaged in the provision of "gateway" services that section 274(h)(2)(C) excludes from the definition of electronic publishing services. Further, the statute expressly excludes "introductory information content" from the definition of electronic publishing services. Similarly, we find that end user software products, such as World Wide Web browsers, to the extent they enable users "to access electronic publishing services" and do not themselves incorporate the content types listed in section 274(h)(1), constitute "navigational systems" that are excepted from the definition of electronic publishing. Further, we conclude that hypertext "links,"¹¹⁴ and other pointers, from any gateway or navigational system to electronic publishing content are similarly "navigational" systems and thus are not electronic publishing services under section 274(h)(1).

47. Moreover, we find that, to the extent BOCs engage in activities that are excluded from the definition of electronic publishing under section 274(h), they are not subject to the joint marketing restrictions of section 274(c) with respect to those activities.¹¹⁵ We find, however, that certain activities that are excluded from the definition of electronic publishing may still be information services subject to the separate affiliate, nondiscrimination, and joint marketing requirements of section 272. For example, although "gateway" services, as discussed above, are generally excluded from the definition of electronic publishing services, in the *Non-Accounting Safeguards Order* we found that certain BOC-provided Internet access services may be interLATA information services subject to the requirements of section 272.¹¹⁶

48. As to services that are neither expressly included nor excluded from the definition of electronic publishing, or services whose proper classification may be otherwise

¹¹⁴ A "hypertext link" is a reference from one document to another. On the World Wide Web, a user can select a link on one page and "jump" to a second page referenced by that link. See generally *Wired Style: Principles of English Usage in the Digital Age* (Hale ed., 1996) at 49-50.

¹¹⁵ See, e.g., Joint Parties at 5.

¹¹⁶ *Non-Accounting Safeguards Order* at ¶ 127.

ambiguous, it would be speculative for us to determine at this time whether such services are electronic publishing services.¹¹⁷ Rather, we find that the appropriate classification of an ambiguous service will necessarily involve a fact-specific analysis that is best performed on a case-by-case basis.¹¹⁸ Moreover, we decline to adopt NAA's proposal that we rely solely on whether such service involves "the generation or alteration of the content of information."¹¹⁹ Although we recognize that Congress used this language in describing several exceptions to the definition of electronic publishing, we do not find this fact to be dispositive in itself. There is no indication in section 274 or its legislative history that Congress intended the "generation or alteration" language to be the controlling factor in determining the nature of ambiguous services. We may, nevertheless, take it into consideration in any determination we make concerning the classification of an ambiguous service.

49. As to the electronic publishing services described in section 274(h)(1), we conclude, for the reasons discussed below, that a BOC must control, or have a financial interest in, the content of information transmitted over its basic telephone service in order to be subject to the requirements of section 274. We therefore agree with those parties that argue that a BOC is not subject to section 274 requirements merely because it provides the transmission component of an electronic publishing service offered by an unaffiliated entity to end users. We find support for our conclusion in two of the exceptions to the definition of electronic publishing -- section 274(h)(2)(B), which excepts from the definition of electronic publishing "[t]he transmission of information as a common carrier," and section 274(h)(2)(M), which excludes "[a]ny other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information."¹²⁰ We note further that this "control or financial interest" test is consistent with the definition of electronic publishing in the Modification of Final Judgment (MFJ).¹²¹ As discussed below, however, because we received very few comments on the exact meaning of

¹¹⁷ We note, for example, that the definition of electronic publishing in section 274(h)(1) includes "other like or similar information." 47 U.S.C. § 274(h)(1).

¹¹⁸ This conclusion is consistent with the discussion of electronic publishing services in the *Non-Accounting Safeguards Order*. See *Non-Accounting Safeguards Order* at ¶ 140.

¹¹⁹ NAA at 3; see also NYNEX Reply at 11-12.

¹²⁰ 47 U.S.C. §§ 274(h)(2)(B), (M).

¹²¹ The MFJ, among other things, prohibited AT&T from engaging in electronic publishing over its own transmission facilities. It defined "electronic publishing" as the "provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means." See *United States v. Western Electric*, 552 F. Supp. 131, 180-81 (D.D.C. 1982) (emphasis added), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

"control" and "financial interest," we are seeking additional comment on this issue in a *Further Notice of Proposed Rulemaking* ("Further Notice").¹²²

50. Finally, we conclude that section 274 applies to a BOC's provision of both intraLATA and interLATA electronic publishing services. Nothing in the statute or its legislative history suggests that Congress intended to distinguish between intraLATA and interLATA electronic publishing services. We therefore agree with those commenters that argue that, if Congress had intended to distinguish between intraLATA and interLATA electronic publishing as it did in describing information services subject to section 272, it would have done so.¹²³

2. Dissemination by Means of "Basic Telephone Service"

a. Background

51. Section 274 prescribes the terms under which a BOC may offer electronic publishing. Section 274(a) states that no BOC or BOC affiliate "may engage in the provision of electronic publishing that is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing."¹²⁴ In the *Notice*, we tentatively concluded that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture."¹²⁵

b. Comments

52. No commenters disagree with our tentative conclusion that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an

¹²² See part VII, *infra*. In addition, we note that based on the record in the *Non-Accounting Safeguards Order*, we did not adopt a "control or financial interest" test in that proceeding for the purpose of determining whether ambiguous information services are subject to section 272 or section 274. See *Non-Accounting Safeguards Order* at ¶ 140. We stated, however, that the definition of electronic publishing could be further refined in the instant proceeding, as we are doing herein. *Id.*

¹²³ See, e.g., NAA at 3 n.2, NYNEX at 5; YPPA at 2.

¹²⁴ 47 U.S.C. § 274(a).

¹²⁵ *Notice* at ¶ 32.

"electronic publishing joint venture."¹²⁶ The majority of BOCs point out, however, that electronic publishing *not* disseminated via the basic telephone service of a BOC or its affiliate is not subject to the requirements of section 274.¹²⁷ For example, PacTel maintains that a BOC or its affiliate may engage in the provision of electronic publishing service disseminated by means of telephone exchange service or facilities provided by a competitive wireline telephone service provider without having to create a separated affiliate or electronic publishing joint venture under section 274(a).¹²⁸

53. Similarly, Ameritech asserts, and SBC agrees, that if a BOC only provides exchange access, and not basic telephone service, it is not subject to section 274 requirements.¹²⁹ For example, Ameritech contends that, if a BOC originates or terminates a toll call disseminating electronic publishing information, the BOC is providing "exchange access," not exchange service.¹³⁰ In response, AT&T asserts that "basic telephone service" under section 274 extends to any electronic publishing disseminated by means of either the BOC or its affiliate's local exchange service or local exchange facilities. This definition, AT&T argues, would include the exchange access service of a BOC or its affiliate.¹³¹

c. Discussion

54. We affirm our tentative conclusion that, pursuant to the plain language of section 274(a), a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture." Moreover, in reading section 274(a) together with the definition of "basic telephone service" in section 274(i)(2), we conclude that a BOC or BOC affiliate is not required to provide electronic publishing services through a separated affiliate or electronic publishing joint venture if it disseminates its electronic publishing via the basic telephone service of a competing wireline

¹²⁶ See, e.g., MCI at 3-4; PacTel at 8; SBC Reply at 5; Time Warner at 8; U S WEST at 3; U S WEST Reply at 4.

¹²⁷ Ameritech at 7-8; Bell Atlantic Reply at 8; NYNEX at 6; PacTel at 8; SBC at 4.

¹²⁸ PacTel at 8.

¹²⁹ Ameritech at 7-8; Ameritech Reply at 1-2; SBC Reply at 5.

¹³⁰ Thus, Ameritech argues, if a database used to provide the electronic publishing service is located outside the BOC's service territory and accessible only by the BOC's provision of exchange access, the BOC is not providing electronic publishing service subject to section 274. See Ameritech Reply at 1; SBC Reply at 5.

¹³¹ AT&T Reply at 10-11.

local exchange carrier or commercial mobile radio service provider.¹³² We find that dissemination via the basic telephone service of competing, unaffiliated providers significantly reduces the ability of the BOC to allocate costs improperly and to discriminate in favor of its affiliate.¹³³ We therefore decline to apply the requirement that a BOC provide electronic publishing services through a separated affiliate or electronic publishing joint venture where Congress did not. We also conclude that, with respect to electronic publishing services provided through the Internet, "dissemination" means the transmission of information via a BOC or its affiliate's basic telephone service to the Internet, rather than the transmission of information to the end user. Thus, a BOC that is providing Internet access services to end users, and nothing more, is not engaged in the provision of electronic publishing pursuant to section 274.

55. We reject Ameritech's assertion, however, that a BOC's dissemination of electronic publishing services through its exchange access service is exempt from the requirements of section 274. Pursuant to section 274(a), BOCs that provide electronic publishing services disseminated via their own "basic telephone service" must do so through a separated affiliate or electronic publishing joint venture. Section 274(i)(2) defines "basic telephone service" as "any wireline telephone exchange service, or *wireline telephone exchange service facility*, provided by a [BOC] in a telephone exchange area."¹³⁴ We find that, when a BOC provides exchange access service, it uses its telephone exchange service facilities. Indeed, "exchange access" is defined in section 153(16) as "the offering of access to telephone exchange services *or facilities* for the purpose of the origination or termination of telephone toll services."¹³⁵ Since the definition of "basic telephone service" in section 274(i)(2) encompasses both the telephone exchange service and the exchange service *facility*, the use of exchange access service, which in turn uses the BOC's telephone exchange service facilities, for the dissemination of electronic publishing falls within this definition and must be provided in accordance with the requirements of section 274. This conclusion is appropriate as a matter of policy, too, since the BOCs' near-monopoly over exchange access service as well as local exchange service gives them an incentive to allocate costs improperly and discriminate against unaffiliated electronic publishing entities.¹³⁶

¹³² Section 274(i)(2) expressly excepts from the definition of basic telephone service "a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984" and "commercial mobile service." 47 U.S.C. §§ 274(i)(2)(A),(B).

¹³³ See generally Notice at ¶ 7.8 (arguing that, because of the BOCs' existing monopoly power in providing local exchange and exchange access service, they may potentially discriminate in the provision of such services and facilities to their competitors).

¹³⁴ 47 U.S.C. § 274(i)(2) (emphasis added).

¹³⁵ *Id.* § 153(16) (emphasis added).

¹³⁶ See Notice at ¶ 7.8.